

Appeals Board will use the date of accident of December 4, 1993, in this order unless referring to specific testimony of a witness.

ISSUES

The respondent asked the Appeals Board to review the issue of whether claimant's alleged personal injury arose out of and in the course of his employment with the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the brief of the respondent, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant alleges he injured his right shoulder while working for the respondent on December 4, 1993. At the time of the alleged accident, claimant had been employed by the respondent for 12 years. Claimant testified he injured his right shoulder as he was dragged 12 to 15 feet by an electrical cable. The accident is alleged to have occurred while the claimant and a fellow employee, Robin Rose, were feeding an electrical cable down a pilot hole on the roof of the respondent's mine. The cable was being fed into the mine for the purpose of installing an exhaust fan in the mine. Claimant continued to perform his regular job duties, that included heavy physical labor through December 7, 1993.

On December 7, 1993, claimant was treated at the emergency room of the Medicine Lodge Memorial Hospital for right shoulder pain. Claimant was treated by the respondent's company physician, Richard W. Meador, D.O., who was on call that particular evening. Dr. Meador took claimant off work and after a brief course of physical therapy claimant was referred to Michael P. Estivo, D.O., a surgeon in Wichita, Kansas, for examination and treatment.

Dr. Estivo ordered an MRI examination which showed a right rotator cuff tear. The rotator cuff tear was surgically repaired by Dr. Estivo on December 30, 1993. Claimant was released to return to work on June 14, 1994. At the time of claimant's preliminary hearing testimony on June 6, 1995, which was also used as his regular hearing testimony, claimant was working for the respondent.

The parties stipulated that claimant suffered a 6 percent permanent partial impairment of the right shoulder. The Administrative Law Judge granted claimant's request for permanent partial disability benefits based on the stipulated 6 percent permanent functional impairment to claimant's right shoulder. The claimant received an award limited to the shoulder as set forth in the schedule contained in K.S.A. 44-510d(a)(13). Claimant's date of accident was December 4, 1993, and the "new act" that became effective

July 1, 1993, changed a shoulder injury from a whole body injury to a scheduled injury limited to a maximum of 225 weeks instead of the whole body maximum of 415 weeks.

The respondent disagrees with the Administrative Law Judge's award. The respondent's principle argument centers around the conflict in the testimony between the claimant and the testimony of Dr. Meador. As previously noted, Dr. Meador treated claimant at the emergency room on the evening of December 7, 1993, and followed the claimant until the doctor referred him to Dr. Estivo who first saw claimant on December 16, 1993. Dr. Meador was the only physician to testify in the case. At Dr. Meador's deposition that was held on January 11, 1996, medical records were admitted into the record which included Dr. Meador's emergency room record at Medicine Lodge Memorial Hospital dated December 7, 1993, and Dean E. Stucky's, M.D., medical notes concerning treatment of the claimant dated November 5, 1993 through December 6, 1993. The hospital emergency room record does not relate claimant's right shoulder injury to his work. In fact, Dr. Meador unequivocally testified that on at least two occasions during his examination of claimant on the night of December 7, 1993, he asked claimant if he injured his right shoulder at work. Dr. Meador indicated that claimant's reply on both occasions was no. Dr. Meador explained his assessment of claimant following his examination as "Pain right shoulder X one week etiology of undetermined origin, no history of trauma." Dr. Meador further testified that claimant told him following the emergency room treatment that he had previously been treated by Dr. Stucky, his family physician, for the same pain in the right shoulder. Dr. Stucky's medical record which was admitted at Dr. Meador's deposition indicates that claimant was seen by Dr. Stucky on November 29, 1993, a few days prior to his alleged injury complaining of shoulder pain that Dr. Stucky indicates claimant had "recurrent once before."

In contrast, claimant testified he had seen Dr. Stucky for symptoms in regard to his left shoulder and not his right shoulder. However, following claimant's right shoulder injury the medical records indicate that claimant did not complain of left shoulder symptoms and did not receive any further treatment for his left shoulder. During claimant's preliminary hearing testimony, he was asked whether he had suffered any type of injury to right shoulder prior to the dragging incident on December 3, 1993. Claimant replied he had not suffered any prior injury to his right shoulder. However, later in his preliminary hearing testimony, claimant testified he had injured his right shoulder while working inside the mine a few days before the December 3, 1993, incident. Claimant went on to indicate that the December 3, 1993, incident was the one that caused him the most pain.

Claimant also claimed he notified his supervisor that he had injured his right shoulder at work. Tim Hanson, mining and quarry engineer for respondent and claimant's supervisor at this time, testified claimant mentioned to him that his shoulder was sore but did not relate the soreness to his work. Mr. Hanson testified the first time he received information that claimant was making a workers compensation claim for his right shoulder injury was information he received from Dr. Estivo's office after claimant's right shoulder operation. Following the dragging incident on December 3, 1993, Mr. Hanson testified he

knew claimant worked on December 4, 6, and 7 performing hard physical demanding labor without complaining of pain to either Mr. Hanson or his fellow employees.

Claimant bears the burden in a workers compensation case to prove by a preponderance of the credible evidence his right to an award of compensation. See K.S.A. 44-501(a) and K.S.A. 44-508(g). Based on the facts set forth above, the Appeals Board finds claimant has failed to sustain this requisite burden. Claimant's testimony is inconsistent and is directly contradicted by Dr. Meador and the medical records admitted into the evidentiary record. Accordingly, the Appeals Board concludes that the Award of Administrative Law Judge John D. Clark entitling claimant to permanent partial disability benefits based on a 6 percent functional impairment to claimant's right shoulder should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 16, 1996, should be, and is hereby, reversed and an award in favor of the claimant and against respondent, National Gypsum Company, and its insurance carrier, National Union Fire Insurance, is denied.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against respondent as contained in the Award.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
James M. McVay, Great Bend, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director